U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 March 2004

CASE NO.: 2003-LHC-1071

OWCP NO.: 07-153498

IN THE MATTER OF:

EZZARD C. LEE,
Claimant

v.

NORTHROP GRUMMAN SHIP SYSTEMS,
AVONDALE SHIPYARD DIVISION
Employer (Self-insured)

APPEARANCES:

Judith A. Gainsburgh, Esq.
On behalf of Claimant

Richard Vale, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, et seq., brought by Ezzard C. Lee (Claimant) against Northrop Grumman Ship Systems, Avondale Shipyard Division (Employer, Self-insured). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges

for a formal hearing. A hearing before the undersigned was held on October 27, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified, called Tom Meunier and introduced 11 exhibits which were admitted, including: medical records and deposition of Dr. Bobo; medical records of Dr. Lee and Mississippi Baptist Medical Center; vocational reports of Mr. Meunier; documentation of Claimant's job search; and Employer's first report of injury.[1] Employer called Dot Moffett-Douglas and introduced 20 exhibits which were admitted, including: Claimant's personnel records; deposition of Claimant; medical records and depositions of Dr. Katz, Dr. Bobo and Dr. Culicchia; medical records of Dr. Summer and Mississippi Baptist Medical Center; functional capacity evaluation reports; vocational records of Moffett-Douglas; and various Department of Labor filings.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on June 22, 1999;

2. The accident was in the course and scope of employment;

3. An employer/employee relationship existed at the time of the accident;

4. Employer was advised of injury on June 22, 1999;

5. Employer filed Notices of Controversion on August 5, 1999; September 7, 1999; September 20, 2002; November 18, 2002; December 3, 2002; and December 30, 2002;

6. An informal conference was held on December 17, 2002;

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

7. Claimant's average weekly wage at the time of injury was $519.95;

8. Employer paid temporary total disability benefits from June 23, 1999 through September 23, 2002, at the weekly rate of $346.63 for 169.85 weeks, and permanent partial disability benefits from September 24, 2002 through November 17, 2002, at a weekly rate of $179.69 for 7.85 weeks, for a total of $60,430.86 in indemnity benefits;

9. Employer had paid Claimant's medical expenses;

10. Claimant reached maximum medical improvement with a residual permanent disability on May 6, 2002.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Extent of Claimant's disability;

2. Entitlement to benefits;

3. Suitable alternative employment;

4. Attorney's fees.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant is a 49 year-old male residing by himself in Mt. Hermon, Louisiana, where he owns and cares for his house.[2] At the time of his accident in June, 1999, Claimant resided in McComb, Mississippi. After his injury, Claimant moved back to Mt. Hermon. Claimant completed high school, but was enrolled in special education and has difficulty reading and spelling; he can write "so-so". Claimant testified he can read some things, such as statistics in the sports page, but has difficulty with others; he cannot read blueprints. (Tr. 20-21, 46-47, 52-53, 72). Claimant has not worked since his 1999 accident and injury. At that time, he had worked as a ship-fitter at Employer for twelve

[2] Mt. Hermon is approximately 100 miles north of New Orleans, Louisiana. (Tr. 21).

years. He primarily repaired ships by cutting out sections of the ship, then replacing it with pieces of metal; the work was heavy duty and involved using tape measures, mauls, chain falls and steel. (Tr. 22-23). Before working at Employer, Claimant was a breeder for the Yellow Jackets Training Center; it was a hard labor job which required him to clean horse stalls. Claimant was also a ship-fitter for Geosource Shipyard and Wall Shipyard. Claimant testified he never held a desk job or other position requiring him to keep records or do paperwork. He has never worked with the public or held jobs as a cashier or fast order cook. (Tr. 24-25).

Claimant ruptured a disc in his lower back in June, 1999, when he was pulling 80-foot cables and 35-ton shackles to move skids. During this assignment he felt pain in his lower back but finished the job before reporting it to his boss. Claimant first treated with Employer's first-aid office which made an appointment for him to see Dr. Mabey. Dr. Mabey took x-rays of Claimant's back and diagnosed him with a ruptured disc; he restricted Claimant from work for one week. When Claimant returned for a follow-up appointment he treated with Dr. Cochran who returned him to work. However, Claimant had to go back to first-aid and eventually saw his family doctor, Zina Lee, of no relation. She performed an MRI and diagnosed the ruptured disc and referred Claimant to Dr. Hunt Bobo. (Tr. 25-27, 51). Dr. Bobo gave Claimant two sets of steroid injections but they did not relieve his pain. On January 17, 2001, Dr. Bobo performed a lumbar fusion cage at Claimant's L5/S1 level. Claimant followed up with Dr. Bobo, and was eventually discharged in May 2002. At that time, Claimant was taking Vioxx for arthritis and Lorcet for pain; he testified the medications made him sleepy. Dr. Bobo referred Claimant back to Dr. Lee for medication management. Claimant testified he switched from Lorcet to Vicodin, which he took 4 times per day, resulting in drowsiness; as such, Claimant believed he could not work while taking these drugs. However, Claimant has driven while on these medications. (Tr. 27-30, 67, 69). Claimant stated Dr. Lee was aware of the drugs' side effects, but told Claimant it was okay because he was in too much pain to work anyway. (Tr. 73).

Claimant testified Dr. Bobo released him to light duty work, with restrictions of no continual bending or stooping and lifting of up to 20 pounds. However, on cross-examination, Claimant testified he did not think he could return to work even within these restrictions because every day his pain was different. At his deposition on July 8, 2003, Claimant testified he could do light duty work; at the hearing he also testified he could work a light duty job near his home if the employer allowed him to take his medication. He explained his pain had worsened, although he did not return to Dr. Bobo since December 2002. (Tr. 54-57, 70). Claimant attempted to return to work and filled out applications at Wal Mart stores in Covington and Hammond, Louisiana, and Winn-Dixie, Swifty Serve and Market Max in Franklinton, Louisiana. He filled out the applications shortly after Dr. Bobo discharged him in 2002, but was not hired. (Tr. 30-31). Claimant also received a list of three positions from Dot Moffett-Douglas in 2002: a cashier through Job Service in Bogalusa; position with Fast Car Wash in Hammond and

a nursery job in St. Tammany Parish. Claimant sought out these jobs but was unsuccessful; the first employer said they were looking for a woman and the latter two were not hiring. Each of the positions was a 45-60 minute drive from Claimant's home in Mt. Hermon. (Tr. 32-33). Claimant received a letter from Employer instructing him to return to work or his compensation would be terminated; he went to Employer on November 18, 2002, but the person he was to see was not present. Claimant attempted to return the next day, but his back bothered him so much he had to stop and stay with his sister in Hammond; he testified the drive from his house to Employer was about 100 miles one way, which took longer than 30 minutes to complete. (Tr. 33-35).

After Claimant's failed attempt to drive to Employer, he made an appointment with Dr. Bobo who informed him the long ride aggravated his back pain. Dr. Bobo took an MRI and x-rays at this visit, and restricted Claimant from performing any work. Claimant returned for a follow-up appointment in December 2002, at which time Dr. Bobo diagnosed him with chronic back pain and instructed him to continue his medication therapy with Dr. Lee. Claimant testified he continued with the same restrictions of no continual bending, stooping or lifting more than twenty pounds, but Dr. Bobo also restricted him from sitting or standing longer than 30 minutes. (Tr. 35-37). On cross-examination, Claimant testified Dr. Lee's office is in McComb, Mississippi, about a 60 minute drive, and Dr. Bobo's office is in Jackson, Mississippi, 130 miles from his home. (Tr. 58-60). Claimant testified he can drive for 30 minutes at a time, which would include going to Franklinton and Arcola, possibly Amite, but not Hammond, Independence or Kentwood. (Tr. 61-63).

Claimant attempted to secure employment after December, 2002, pursuing three jobs on a list sent by Dot Moffett. In August 2003, Claimant filled out an application for a cashier/clerk at a Shell Station in Amite, but has not heard from them. He also applied at a Texaco Station in Roseland, a 45-minute drive, but he did not have the necessary cashier experience. Claimant pursued jobs at Popeye's Fried Chicken and McDonald's in Amite, but they were not hiring. (Tr. 37-39). He attempted to apply for a job at Riverside Medical Center, but they did not return his call. Moffett-Douglas provided him information about a horse grooming job outside of Amite; however, Claimant testified that job probably required a lot of stooping and bending, and he did not apply because he stated it would be dangerous to be around horses on the medication. Claimant met with Tom Meunier, a vocational rehabilitation consultant, who informed him there were no jobs available which he could perform. (Tr. 39-42).

Claimant testified Employer paid him compensation benefits for the first eight days following his accident, but stopped payments until December, 1999, when he retained a lawyer. At that point Employer paid him back-benefits and continued paying him up until September 2002, when they reduced benefits before finally cutting him off on November 17, 2002. Since then, Claimant has lived off of food stamps and loans from his sister. Claimant testified he still has problems with back pain and left leg

numbness; the pain worsens as the weather changes. He testified he uses a walking cane 90% of the time in case his legs go out; the cane was not prescribed to him and nobody taught him how to use it. Although Claimant's left leg tends to go out, he walks with the cane on his right side. (Tr. 42-44, 58-59). Claimant also testified driving makes his back pain worse; the most comfortable position is laying on a hard surface. He would like to be working, but testified people are hesitant to hire him because of his physical condition. (Tr. 44-45).

B. Testimony of Tom Meunier

Meunier is a licensed vocational rehabilitation counselor since 1989, and was accepted by the parties and the court as an expert in his field. Meunier first saw Claimant in August, 2001, and has been in contact with him on several occasions since then. At their first meeting, Meunier interviewed Claimant, took his educational and employment histories and discussed his local labor market and medical restrictions. Meunier reviewed limited medical files but as of August, 2001, did not have information regarding Claimant's MMI or permanent restrictions. He also performed the Wide Range Achievement Test and determined Claimant functioned in the deficient range for language skills, operating at a second to third grade level, and had low-average arithmetic functioning, operating on a 7th grade level. Claimant was not on medication the day of the testing. (Tr. 75-78, 108-09). Meunier found Claimant to be a high school graduate, but he was enrolled in special education classes and failed several grades; he never held a job which required academic skills. (Tr. 78). Claimant's employment history included jobs as a ship-fitter and horse stable attendant; Meunier testified both positions were heavy-duty work and provided Claimant with no transferable skills. He explained a transferable skills analysis is only helpful when comparing potential jobs within the same industry as Claimant's past job and with the same or lower Specific Vocational Preparation levels. (Tr. 79-83). Meunier testified there are no transferable skills for semi-skilled or skilled light-medium duty work for a person who is relegated to unskilled light-medium work. (Tr. 85).

Meunier's initial opinion was Claimant would be limited to light exertional work and there would be little or nothing available to him in his area, given his education and lack of transferable skills. Meunier received a copy of Claimant's June, 2002, Functional Capacity Evaluation which placed him in the light category, with restrictions of lifting 20-25 pounds, occasional standing and walking, and no stooping or bending. Meunier testified these are severe restrictions for unskilled work. (Tr. 86-87). He also received a copy of Ms. Moffett-Douglas' September 17, 2002 report, which classified Claimant in similar academic levels as his own report. Finally, Meunier was aware Claimant applied for jobs at Winn Dixie, Swifty Serve, Market Max and Wal Mart; he opined these jobs were not within Claimant's physical restrictions, but testified he did not discourage Claimant from applying. (Tr. 88-89). Meunier also testified the jobs identified in

Moffett-Douglas' report were not suitable for Claimant; the Lincoln Nursery position required repetitive bending and stooping and the Fast-Lane cashier position was outside Claimant's arithmetic skills with little opportunity to sit down. He stated the Nursery job was a 30-minute drive from Claimant's home while the Fast-Lane cashier position, as well as the job in Bogalusa, were an hour's drive from his home in Mt. Hermon. (Tr. 89-92). On December 12, 2002, Meunier released his second report opining there were no appropriate or suitable jobs for Claimant within a reasonable commuting distance from his home. (Tr. 92).

Meunier released his next report on September 30, 2003, which took into consideration updated medical records from Dr. Bobo, including his additional restrictions Claimant could not drive more than 30 minutes at a time, and additional labor market surveys conducted by Moffett-Douglas. Meunier testified he called the employers listed in Moffett-Douglas' July 31, 2003 labor market survey, and based on these conversations there were no jobs listed which were suitable for Claimant, either physically or academically. Specifically, Meunier testified the fast-food position would likely require excessive standing, repetitive stooping and bending, and Claimant would have to read the tickets. (Tr. 93-95, 97-98). He testified many of the jobs identified were outside Claimant's 30-minute driving distance, as he discovered by entering the precise addresses on MapQuest, a computer generated program; Amite was 46 minutes, Folsom was 56 minutes and Employer's facility was two hours from Claimant's home. (Tr. 95-96). Meunier followed up with the Popeye's position listed in the October 7 report, but it was no longer available. (Tr. 99). He reviewed the October 21, 2003 labor market survey which listed jobs as a fast food worker, security guard, cashier and groundskeeper; Meunier opined each of the jobs was unsuitable for Claimant. Additionally, he testified the horse grooming position was unsuitable because it required repetitive stooping and bending. (Tr. 98-100).

Meunier testified Claimant was not employable in his local labor market given his age, education, work experience and physical restrictions. Specifically, he stated the restriction of standing and walking in 30-minute intervals, as well as no bending or flexing at the waist, eliminate every job in the unskilled light-medium category. Meunier testified the cardinal feature of unskilled light work is staying primarily in one position, and standing most of the time. This type of job would not be suitable for Claimant given Dr. Bobo's restrictions standing/walking no more than 30 minutes; Meunier testified Dr. Bobo's exertional and postural restrictions are contradictory. (Tr. 100, 111-12). However, on cross-examination, he testified he did not actually look for jobs in Claimant's geographical area, and he has only met with him on one occasion. Meunier testified, though, that he has done labor market surveys in Claimant's area in the past and was very familiar with the types of jobs available; he stated it would be unethical for him to run a bill on a labor market survey for a job he did not think existed for Claimant. There may have been an odd-lot job with a sympathetic employer who would allow Claimant to do what he needed to perform his duties, but he did not look for such jobs.

(Tr. 101, 109, 114). Meunier also testified Dr. Bobo's deposition was unclear as to Claimant's work exertion level, except he did state Claimant could not stand or drive longer than 30 minutes and could not engage in repetitive bending or stooping. (Tr. 104-05). Although Dr. Bobo testified as to Claimant's ability to perform certain jobs, Meunier stated the doctor is not knowledgeable of the physical demands of actual realistic jobs in the labor market. (Tr. 106).

C. Testimony of Dot Moffett-Douglas

Moffett-Douglas was accepted by the parties and the court as an expert in the field of vocational rehabilitation counseling. She was retained by Employer to perform a vocational assessment of Claimant; her initial evaluation was conducted on September 17, 2002. (Tr. 116-17). In her vocational assessment of Claimant, Moffett-Douglas found him to be employable in entry-level, high school graduate jobs, and possibly jobs which require craft work such as reading blue prints or following instructions. (EX 11, p. 4). Moffett-Douglas testified Claimant functioned on a second-third grade level in language skills and on a fifth or seventh grade level in arithmetic; she found him to be a high school graduate who enrolled in special education classes. She agreed with Meunier with regards to Claimant's academic abilities. (Tr. 118). However, in response to Meunier's report, Moffett-Douglas opined there were many unskilled or semi-skilled jobs within Claimant's geographical area and Dr. Bobo's restrictions. Moreover, Claimant's job as shipfitter was a skilled position and enabled Claimant to have the capacity to learn a new trade. (EX 11, p. 8). After reviewing Dr. Bobo's deposition, Moffett-Douglas understood Claimant's restrictions to be light/medium duty work with no repetitive squatting, 25 pounds lifting and push/pull no more than 28 pounds. She testified this was between the light and medium levels of exertion. Moffett-Douglas also testified Claimant had driving restrictions of no more than 30 minutes; his FCE restricted him to alternate sitting, standing and walking. She analyzed this last restriction as being 2.5 hours in each position, or 5 hours of standing and walking with sitting during breaks. (Tr. 118-21).

Moffett-Douglas located the following jobs in Claimant's geographical area:

Job Title	**Employer**	**Location**	**Description**	**Hourly Pay**	**Date Available**
Security guard	Amite Truck Plaza	Amite, LA	Alternate sitting and standing, on the job training	$7.00	5/6/02
Guard	Job Service	Hammond, LA	Light duty	$5.25	5/6/02
Deli worker	John's Curb Market	Loranger, LA	Work cashier and deli counter; will train	$5.25	5/6/02

Harvest Leader	Zelenka Nursery	Franklinton, LA	Will train for paperwork and supervise flower harvest	$5.15	9/13/02
Cashier	Job Service	Bogalusa, LA	Light duty	$5.15/ 35 hours	9/13/02
Cashier	Fast Lane Car Wash	Hammond, LA	Light duty	$5.25	9/13/02
Farm Assistant	South East Research Station	Franklinton, LA	Medium Duty, operate machinery	$6.00	2/28/03
Grounds-keeper	Franklinton Country Club	Franklinton, LA	Medium duty	$6.00	2/28/03
Fast food	McDonalds	Franklinton, LA	Wait on customers, work cash register	$5.50	2/28/03 and 10/13/03
Fast food	McDonalds	Amite, LA	Light duty	$5.15	7/30/03
Cashier	Texaco Service Station	Arcola, LA	Light duty, work cash register, monitor pumping station	$5.15	7/30/03
Cashier	Shell Service Station	Amite, LA	Light duty	$5.60	7/30/03 and 10/13/03
Cashier-clean up crew	Natalbany campground	3 miles west of Amite, LA	Collect money, pick up campgrounds	$5.15	7/30/03
Fast food	Burger King	Franklinton, LA	Light duty, part time	$5.15	10/13/03
Cashier-clerk	KC Grocery	Franklinton, LA	Light duty	$5.15/ 35 hours	10/13/03
Cashier	John's Conoco Express	Folsom, LA	Light duty	$5.45	10/13/03

(EX 11, pp. 5-6, 9-12, 31). Additionally, Employer offered Claimant a light duty position in their facility, which required Claimant to constantly carry a 5-6 pound torch; there would be frequent standing and occasional sitting as needed. (EX 11, p. 34).

Considering Claimant's education, age, work experience and the restrictions outlined above, Moffett-Douglas testified the fast-food positions at McDonald's, Burger King and Popeye's were all suitable and available for Claimant. She stated any job in Franklinton would satisfy Claimant's driving restrictions. She clarified the convenience

store jobs were not actually available, but the employers were accepting applications for future openings. She stated these jobs would allow Claimant to take breaks and sit down; Dr. Bobo did not say Claimant needed to lie down. On cross-examination she testified the fast food positions alternate between walking and standing, depending on the business; she found the Franklinton restaurants were not very busy. (Tr. 120-23, 125-26). Moffett-Douglas testified she found some medium duty jobs in Franklinton, but decided to rule them out as inappropriate after reviewing Dr. Bobo's deposition. Given the inconsistencies in his testimony, she would rather have him review the medium-duty jobs himself, through a written analysis or photographs. (Tr. 122-23). Moffett-Douglas testified the jobs in Folsom were about 5 minutes outside Claimant's 30-minute driving restriction. (Tr. 123).

Moffett-Douglas testified she did not think it was unethical of her to perform this Labor Market Survey, because Claimant was eager to work. She found the fast food positions to be suitable for Claimant, opining he may be able to transfer to a convenience store after becoming familiar with operating a cash register; she testified at fast food restaurants the registers have pictures, so they are easy to learn. In her report, she indicated the unemployment rate for Washington Parish, where Claimant resides, was 8% on January 3, 2003. (Tr. 123-25; EX 11, p. 10).

D. Exhibits

(1) Medical Testimony and Records

Claimant first treated with his family doctor, Zina Lee, on July 8, 1999, at which time she diagnosed him with lumbago. An MRI performed on July 14, 1999, revealed a lumbar strain with disc desiccation at the L5-S1 level. Dr. Lee referred Claimant to Dr. Bobo, a neurosurgeon. (CX 5, pp. 6, 9, 16). At the request of Employer, Claimant was examined by orthopedic surgeon Dr. Ralph Katz on July 21, 1999. Dr. Katz testified he did not note any objective signs of injury, and the July 14 MRI did not show a herniation. Dr. Katz restricted Claimant to light duty work in July, 1999, and testified most people who undergo spinal fusions do not return to heavy work, but usually are only capable of sedentary to light duty work. (EX 17, pp. 6, 9, 12-18).

Dr. Bobo first treated Claimant on August 2, 1999, at which time he diagnosed him with a L5-S1 disc herniation, based on the MRI findings. As Claimant had an unremarkable medical history with no prior complaints of back pain, Dr. Bobo related the injury to his work accident. He recommended an anterior lumbar interbody fusion. Dr. Bobo saw Claimant on September 6 and October 28, 1999, noting no significant changes and maintaining his recommendation for the fusion. He also recommended a discogram. (CX 2, pp. 2, 4, 8; CX 3, pp. 9-14).

On November 17, 1999, Dr. Culicchia performed an independent neurological evaluation of Claimant's lumbar spine, recommending a lumbar myelogram before further treatment. (CX 5, pp. 1-2). Dr. Bobo performed the myelogram on January 12, 2000, which revealed disc space narrowing and spurring at the L5-S1 level; he again recommended a discogram. (CX 3, p. 5). In March, 2000, Dr. Summers reported Claimant was not responding well to epidural steroid injections. (EX 7, p. 2). On May 31, 2000, Dr. Culicchia then suggested a lumbar laminectomy. (EX 5, pp. 6-7).

Claimant participated in a functional capacity evaluation on October 25, 2000. He gave near full effort, although he exhibited a minor degree of symptom magnification. The report indicated Claimant's subjective complaints of pain were fairly reliable and consistent with his physical performance. (EX 10, pp. 1, 14). Dr. Bobo testified minor symptom magnification is normal, as a small amount of embellishment is expected. (CX 3, p. 45). The FCE report indicated Claimant was at the sedentary work level and could not return to his prior employment. (EX 10, p. 2).

Dr. Bobo performed the discogram on November 27, 2000, and, as it was consistent with the need for surgery, he performed a spinal fusion on January 17, 2001. (CX 3, pp. 16, 18). Claimant did well post-operatively, although on August 9, 2001, Dr. Bobo noted he was experiencing pain without cause. Dr. Bobo testified he expected Claimant to be normal by this point, but his complaints of pain were not unbelievable. Claimant participated in physical therapy from September to November, 2001. At his follow up appointment with Dr. Bobo on February 5, 2002, Claimant had continued complaints of pain and a return of S1 radicular symptoms. X-rays and an MRI taken of Claimant's lower back showed good progression of the fusion. (CX 3, pp. 21-25; CX 2, pp. 28-29). On May 6, 2002, Claimant presented with complaints of occasional left leg numbness and pain. Dr. Bobo diagnosed Claimant with chronic left leg numbness and pain, found him to be at maximum medical improvement and restricted him to permanent light duty work. He instructed Claimant to follow up with Dr. Lee and return as necessary. (CX 3, pp. 25-27; CX 2, p. 31). On June 26, 2002, Claimant underwent a second FCE which limited him to light duty work and provided restrictions of no stooping or bending, lifting of 25 pounds and occasional sitting, standing and walking. (CX 2, pp. 33-34).

Claimant followed-up with Dr. Lee on July 18, 26 and August 26, 2002. On November 26, 2002, he returned to Dr. Bobo following a failed attempt to drive to Employer. Dr. Bobo noted left S1 radicular change with no evidence of myelopathy; he removed Claimant from work for four weeks. (CX 3, pp. 27, 29; CX 2, p. 42). Claimant returned on December 23, 2002, at which time Dr. Bobo diagnosed him with chronic lumbago. (CX 2, p. 44). Dr. Bobo testified Claimant reported problems with driving more than 30 minutes at one time. He clarified he first noted the driving complaint on November 26, 2002, but it was something Claimant complained about at every visit. On December 23, 2002, Dr. Bobo noted Claimant could only tolerate 30 minutes in a car, but

then had to get out and stretch and could not drive further without exacerbating his back pain. Dr. Bobo added the 30 minute driving restriction to Claimant's previous restrictions based on the subjective complaints of pain. He clarified Claimant needed to change his activities, and testified 30 minute intervals for alternate standing, sitting and walking were reasonable. (CX 3, pp. 29-31, 34).

On cross-examination, Dr. Bobo testified Claimant was capable of driving the 1.5 hours to his office, but could not tolerate such a drive on a daily basis. His goal was to return Claimant to full duty work within six months, although he noted less than half of his worker's compensation patients returned to work. While Dr. Bobo placed post-operative work restrictions on Claimant based solely on his subjective complaints, he testified Claimant was not a malingerer. He explained there is no objective measurement for pain. (CX 3, pp. 46-49, 51). Not taking into consideration his subjective complaints of pain, Dr. Bobo testified he expected Claimant to be able to work as a convenience store cashier, sweeping floors, picking up cases of coke, etc, which he classified as light to medium duty work. However, Dr. Bobo testified Claimant was probably capable of only light duty work, given his complaints of pain. (CX 3, pp. 52-56). Per Dr. Bobo's instructions, Claimant has continued to follow-up with Dr. Lee, who diagnosed him with chronic low back pain and radiculopathy. (CX 5, pp. 1-3). On October 1, 2003, Dr. Lee opined Claimant could not return to his former job and restricted him from lifting more than 15-20 pounds as well as prolonged standing or walking. (CX 6).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends there is no suitable alternative employment available to him; he is permanently totally disabled and benefits were improperly reduced. Specifically, Claimant argues the jobs located by Employer's vocational expert were not within his physical restrictions of alternate sitting, standing and walking; were outside his intellectual capabilities and many were outside his 30 minute driving restriction. Moreover, Claimant contends he diligently, yet unsuccessfully, sought out numerous employment opportunities within his geographic area. As such, even if Employer had established suitable alternative employment, he sufficiently rebutted it. Therefore, because Employer failed to show suitable alternative employment, Claimant contends it improperly reduced benefits on September 26, 2002. Claimant likewise argues Employer improperly terminated benefits on November 17, 2002, because the light duty position at its facility was not suitable for Claimant inasmuch as it was not within the 30 minute driving restrictions imposed by Dr. Bobo.

Employer contends it has established suitable alternative employment on multiple occasions. It argues there is no objective medical reason why Claimant cannot return to

work within his physical restrictions, and he is capable of operating a cash register. Additionally, Employer contends the 30 minute driving restriction is self-imposed by Claimant himself, and not supported by objective medical evidence. Employer asserts Claimant is voluntarily unemployed, and as such it properly reduced and then terminated benefits in 2002.

B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467, 88 S. Ct. at 1145-46; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999). Here, Employer has asserted Claimant's complaints of pain are incredible; as they are not supported by objective medical evidence, they should not be considered in assigning restrictions on his physical activities. While Dr. Bobo acknowledged Claimant's complaints of pain were purely subjective, he did not find reason to disbelieve them. Indeed, the physical therapists who conducted the Functional Capacity Evaluation noted Claimant's complaints of pain are generally consistent with his physical capabilities. As such, I find no reason to discredit Claimant's subjective complaints of pain.

C. Extent of Injury

The parties in this matter stipulated Claimant is unable to return to his former job as a ship-fitter, which is supported by the record as a whole. As such, Claimant has established a *prima facie* case of total disability. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991). Once a *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). To establish suitable alternative employment, an employer must prove the availability of actual employment opportunities within a claimant's geographical location which he could perform considering his age,

education, work experience and physical restriction. *Turner*, 661 F.2d at 1042-43; *Edwards v. Director, OWCP,* 99 F.2d 1374 (9th Cir. 1993); *cert. denied* 511 U.S. 1031 (1994). The Fifth Circuit has held that a single job may constitute suitable alternative employment if the claimant has a reasonable likelihood of obtaining it "under appropriate circumstances." *P&M Crane Co.*, 24 BRBS at 121; *Turner*, 661 F.2d at 1043. A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP, v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999)(crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job).

Pursuant to the medical records and testimony of Dr. Bobo and Dr. Lee, I find Claimant is restricted to light duty work, with no stooping, bending or lifting more than 25 pounds. Additionally, Claimant was restricted to occasional sitting, standing and walking. Dr. Bobo clarified that Claimant needed to change his activities and testified 30 minute intervals were reasonable. Dr. Lee restricted Claimant from lifting more than 20 pounds and prolonged standing or walking. Dr. Bobo further restricted Claimant from driving more than 30 minutes at a time, on a daily basis. Although Dr. Bobo acknowledged he based these restrictions on Claimant's subjective complaints of pain, I note that none of the doctors or therapists discredited Claimant's complaints. The FCE report of October 25, 2000, indicated Claimant's complaints were fairly reliable and consistent with his physical performance; Dr. Bobo similarly testified Claimant's complaints of pain were not unbelievable.

With these restrictions in mind, I find Employer did identify job opportunities within Claimant's physical capabilities; specifically, the cashier positions at Texaco and Shell, as well as the security guard position at Amite Truck Plaza were suitable for Claimant.[3] I find the jobs located in Hammond, Loranger, Bogalusa and Folsom were not suitable as they exceeded Claimant's 30-minute driving restriction. Similarly, the light duty position at Employer's facility also exceeded Claimant's daily driving capabilities. Employer failed to indicate how the fast food, cafeteria or deli-worker positions were suitable given Claimant's restriction from prolonged standing or walking. While Moffett-Douglas acknowledged Claimant would alternate between walking and standing at these locations, she did not indicate he would be able to sit down at any given time. As such, I find these positions were not suitable for Claimant in light of his physical restrictions.

The only physically suitable jobs identified by Moffett-Douglas were the two cashier positions in Amite, as well as the security guard position. There was great debate

3 Moffett-Douglas testified the medium duty jobs she located in Franklinton, Louisiana, were unsuitable for Claimant and she would request specific doctor authorization for each job before submitting it as suitable alternative employment.

over whether Claimant was academically capable of learning and performing these jobs. Particularly notable were his second-third grade language skills and seventh grade arithmetic skills. I find it is doubtful that Claimant would be able to learn how to operate a cash register and change money; as such, jobs would not be realistically available to him. This is supported by Meunier's testimony there was no employment available to Claimant given his physical and intellectual capabilities. Indeed, Claimant unsuccessfully applied at both Shell and Texaco. He also applied, unsuccessfully, to a number of employers in his geographical area, including: Wal Mart; Winn Dixie; Swifty Serve; Market Max; Fast Car Wash; Bogalusa Job Service; Zelenka Nursery; Amite McDonald's; Popeye's Fried Chicken and Riverside Medical Center. Employer could establish suitable alternative employment with one single job (here, the security guard position) which Claimant has a reasonable likelihood of securing under the appropriate circumstances. However, I note that the unemployment rate in Claimant's Parish in January 2003 was 8 percent; additionally, Claimant had unsuccessfully applied for four other positions immediately following Dr. Bobo's release in May 2002. Given the high unemployment rate, Claimant's low level of academic functioning, physical restrictions and his inability to secure other similar positions in the same geographic area, I find he did not have a reasonable likelihood of securing the security guard position in May, 2002. As such, it does not constitute suitable alternative employment.

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). The claimant need not prove that he was turned down for the exact jobs the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991). Notwithstanding Employer's failure to establish suitable alternative employment, I find Claimant diligently sought out employment within his geographic area which conformed to his physical restrictions. He was searching for employment in June 2002, before Employer released its first labor market survey. Claimant continued to search for jobs, albeit unsuccessfully, through October, 2003. Even if Employer had established suitable alternative employment, I conclude Claimant sufficiently rebutted such employment through his fruitless efforts to secure a job post-injury.

D. Conclusion

In conclusion, I find Employer has failed to establish suitable alternative employment in that each of the jobs located were outside Claimant's physical restrictions or academic capabilities. In the alternative, even if suitable alternative employment was established, Claimant sufficiently rebutted said employment by unsuccessfully applying

to ten different employers within his geographic location. In light of the foregoing, I find Employer acted improperly when it reduced Claimant's benefits in September 2002 and then terminated them completely in November 2002. I find Claimant is entitled to temporary total disability benefits from June 23, 1999 through May 6, 2002, and permanent total disability benefits from May 7, 2002, through the present and continuing.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

F. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from June 23, 1999, up to and including May 6, 2002 based on a stipulated average weekly wage of $519.95.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to Section 908(a) of the Act for the period from May 7, 2002, to present and continuing based on a stipulated average weekly wage of $519.95.

3. Employer shall be entitled to a credit for all compensation paid to Claimant after June 22, 1999.

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE